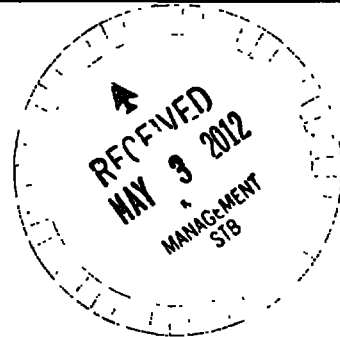




CITY OFFICES • 525 E. SPRING STREET • BOONVILLE, MISSOURI 65233 • 660-882-2332 • FAX 660-882-6608

May 2, 2012

Honorable Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E. Street S.W.
Washington, DC 20423-0001



132261

Re: Docket No. AB 102 (Sub-No. 13), *Missouri-Kansas-Texas Railroad Company*
("MKT") – *Abandonment – in St Charles, Warren, Montgomery, Callaway,*
Boone, Howard, Cooper and Pettis Counties, MO.

Petition for Issuance of a CITU; Statement of Willingness

Fee waiver requested per 49 CFR 1002.2(e)(1)

Dear Honorable Brown:

Enclosed please find an original and 10 copies of the City of Boonville, Missouri's ("City") Petition For Issuance Of A Certificate Of Interim Trail Use, for filing with the Board in the above referenced matter. Counsel for the railroad (Union Pacific Railroad Company ("Union Pacific") as successor to MKT) has authorized City to state that Union Pacific supports this petition and consents to the issuance of the requested CITU.

City is a unit of local government. Pursuant to 49 CFR 1002.2(e)(1), City requests a waiver of all fees otherwise due for this filing. Such waiver will assist in preserving an important bridge for interim trail use on rail property and is in the public interest.

ENTERED
Office of Proceedings

MAY 03 2012

Part of
Public Record

FILED

MAY 03 2012

SURFACE
TRANSPORTATION BOARD

FILED
MAY 03 2012
FEE WAIVER

Very Truly Yours

Attorney For Petitioner

Megan B. McGuire, City Counselor
Missouri Bar No. 50645

City of Boonville

525 E. Spring Street

Boonville, Missouri 65233

Office: 660-882-4002

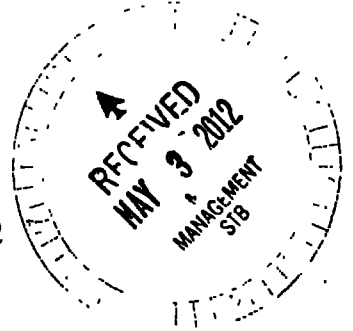
E-mail: mmcguire@boonville-mo.org

BEFORE THE
SURFACE TRANSPORTATION BOARD

MISSOURI-KANSAS-TEXAS
RAILROAD COMPANY –
ABANDONMENT – IN ST.
CHARLES, WARREN,
MONTGOMERY, CALLAWAY,
BOONE, HOWARD, COOPER
AND PETTIS COUNTIES, MO.

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DOCKET NO. AB 102
(SUB-NO. 13)



PETITION FOR ISSUANCE OF A
CERTIFICATE OF INTERIM TRAIL USE

City of Boonville, Missouri
Julie Thacher, Mayor
City Hall
525 E. Spring Street
Boonville, Missouri 65233
Petitioner

By: Megan B. McGuire, City Counselor
Missouri Bar No. 50645
City of Boonville
525 E. Spring Street
Boonville, Missouri 65233
Office: 660-882-4002
FAX: 660-882-4004
E-mail: mmcguire@boonville-mo.org
Attorney for Petitioner

DATE FILED: May 3, 2012

BEFORE THE
SURFACE TRANSPORTATION BOARD

MISSOURI-KANSAS-TEXAS
RAILROAD COMPANY –
ABANDONMENT – IN ST.
CHARLES, WARREN,
MONTGOMERY, CALLAWAY,
BOONE, HOWARD, COOPER
AND PETTIS COUNTIES, MO.

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DOCKET NO. AB 102
(SUB-NO. 13)

REC'D
MAY 3 2012
SIS
MANAGEMENT

**PETITION FOR ISSUANCE OF A
CERTIFICATE OF INTERIM TRAIL USE**

Pursuant to 49 CFR Section 1152.29(a), the City of Boonville, Missouri, a municipal corporation, hereby respectfully petitions for issuance of Certificate of Interim Trail Use (“CITU”) for rail banking and interim recreational trail use of the right of way and structure thereon known collectively as, MKT Missouri River Bridge (the “MKT Bridge”) owned by Union Pacific Railroad Company (the “UP”), successor in interest to Missouri-Kansas-Texas Railroad Company (the “MKT”), on the former MKT line between MP 191.47 at Boonville and MP 191.16 North of Boonville, a distance of approximately .3 miles in Cooper and Howard Counties, Missouri.

A Certificate of Interim Trail Use was granted in this case on April 22, 1987 (the “1987 CITU”) for the former MKT line between Sedalia, MO and Machens, MO, in accordance with an Interim Trail Use Agreement between MKT and Missouri Department of Natural Resources (the “Interim Trail Use Agreement”). However, the MKT Bridge was specially handled under the Interim Trail Use Agreement, with an option on the part of Missouri Department of Natural

Resources (MoDNR) to employ the MKT Bridge for interim trail purposes. In December 2004 MODNR informed UP it intended to exercise its trail use option for the MKT Bridge, but by letter dated May 20, 2005, MoDNR informed UP it was waiving its option to use the MKT Bridge. Five days later, UP filed a notice of consummation of abandonment of the MKT Bridge with the Board. The State of Missouri filed a petition for a declaratory order concerning the status of the MKT Bridge, contending that UP lacked authority to abandon the MKT Bridge and the purported abandonment consummation by UP was therefore null and void. Commenters Rails to Trails Conservancy, et al., supported the relief sought by the State and moved that section 106 of the National Historic Preservation Act be complied with in connection with the proposed MKT Bridge abandonment. City of Boonville concurred with the Commenters.

In a decision served July 13, 2010, the Board ruled that it retained jurisdiction over the rail property in question in this proceeding because UP's purported abandonment consummation was unlawful; in particular, the railroad had failed to comply with section 106 of the NHPA and had also failed to consult with and to obtain necessary permits from pertinent state and federal agencies for MKT Bridge removal. Although the Board granted vacation of the CITU, it ordered compliance with section 106. The Decision of the STB served on July 13, 2010 is herein attached as **Appendix 1**.

Petitioner, UP and the State, after prolonged negotiations, entered into a settlement agreement ("Memorandum of Agreement") executed by the various parties in May and June of 2011. That Memorandum of Agreement provides, among other things, that MoDOT will cooperate in providing substantial (80% of an estimated \$20,000,000 in costs) financial support for construction of a new bridge (the "New Osage River Bridge") over the Osage River for use by UP along with public vehicular and pedestrian use. The Memorandum of Agreement further

provides that upon commencement of such construction so financed, and upon issuance of a CITU for the MKT Bridge by the STB, UP will convey the MKT Bridge and related railroad property to the City of Boonville in accordance with and subject to the National Trails Systems Act, 16 U.S.C. 1247(d), and the terms and conditions of the STB decision approving the interim use/rail banking of the MKT Bridge. A copy of the Memorandum of Agreement is attached as **Appendix 2.**

Construction has now commenced on the New Osage River Bridge. Under the Memorandum of Agreement, it is now timely to request this Board to issue a CITU for the MKT Bridge. Missouri Department of Natural Resources, State Historic Preservation Office (the “SHPO”) has issued a letter stating that it supports the rail banking/interim trail use contemplated by the Settlement Agreement and has determined that such use would create no adverse impact to historic preservation. A copy of the SHPO’s letter is attached as **Appendix 3.**

The U.S. Coast Guard continues to support a transfer of ownership to the Petitioner and has no objections to Petitioner taking over responsibility for the MKT Bridge for interim trail use so long as the MKT Bridge is used for some form of transportation use such as the proposed trail use and that the Petitioner will undertake and assume the obligations under the Code of Federal Regulations with regard to bridges over navigatable waterways. The U.S. Coast Guard has advised Petitioner to contact the U.S. Coast Guard when Petitioner becomes the owner of the MKT Bridge and verify that Petitioner is the contact entity for legal and regulatory matters administered by the U.S. Coast Guard with respect to the MKT Bridge.

In order to issue a CITU for the City of Boonville to acquire the MKT Bridge, it is necessary for the Petitioner to file a “Statement of Willingness to Assume Financial

Responsibility” (the “Statement”) for the property in question. The Statement prepared in accordance with 49 CFR 1152.29 (a)(2) is attached in **Appendix 4**. The Statement includes the map required by 49 CFR 1152.29 (a)(1) and the acknowledgment required by 49 CFR 1152.29(3).

Petitioner is authorized to represent that MoDNR remains the owner/interim trail manager for the remainder of the Katy Trail and that MoDNR supports this petition and the relief requested herein. Petitioner is also authorized to represent that Union Pacific Railroad Company supports the relief requested herein, and consents to the issuance of the CITU. Petitioner is further authorized to represent to the Board and to the U.S. Coast Guard that Petitioner as owner of the MKT Bridge will abide by all applicable federal laws and regulations administered by the U.S. Coast Guard with regard to the MKT Bridge.

Petitioner appreciates the cooperation of the various parties, and believes that issuance of the CITU and preservation of the MKT Bridge not only benefits the public but also achieves the goals and objectives of the Memorandum of Agreement and the applicable statutes and federal regulations including Section 106 of the NHPA.

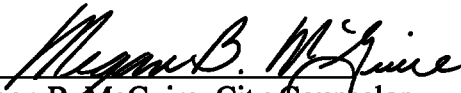
WHEREFORE, the Board is respectfully requested to issue the CITU and to take such other action as is appropriate to reinstate rail banking status for the MKT Bridge and related railroad property thereby assisting with the implementation of those portions of the Memorandum of Agreement subject to the Board’s jurisdiction.

Respectfully submitted,



Julie Thacher, Mayor
City of Boonville, Missouri
City Hall
525 E. Spring Street
Boonville, Missouri 65233

Petitioner

By 

Megan B. McGuire, City Counselor
Missouri Bar No. 50645
City of Boonville
525 E. Spring Street
Boonville, Missouri 65233
Office: 660-882-4002
FAX: 660-882-4004
E-mail: mmcguire@boonville-mo.org

Attorney for Petitioner

DATE FILED: May 3, 2012

Docket No. AB 102 (Sub-No. 13)

CERTIFICATE OF SERVICE

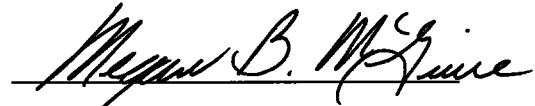
I hereby certify that on May 2, 2012, I served the foregoing document, Petition For Issuance Of
A Certificate of Interim Trail Use, on:

1) Mack Shumate, Esq., Senior General Attorney, Union Pacific Railroad Company, 101 N.
Wacker Dr. Suite 1920, Chicago IL 60606-1718, mackshumate@up.com,

And

2) Mary Bryan, Esq., Real Estate Attorney, Missouri State Parks, P.O. Box 176, Jefferson City,
MO, 65102, mary.bryan@dnr.mo.gov.

by e-mail and first-class, U.S. mail, postage prepaid.


Megan B. McGuire

39741
EB

SERVICE DATE – JULY 13, 2010

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 102 (Sub-No. 13)

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY—ABANDONMENT—IN
ST. CHARLES, WARREN, MONTGOMERY, CALLAWAY, BOONE, HOWARD,
COOPER AND PETTIS COUNTIES, MO.—PETITION
FOR DECLARATORY ORDER

Decided: July 12, 2010

On February 12, 2009,¹ the State of Missouri represented by its Attorney General (Missouri) filed a petition for a declaratory order to clarify the status of the Boonville Lift Bridge near the City of Boonville in Cooper County, Mo. Missouri contends that Union Pacific Railroad Company (UP), as successor to Missouri-Kansas-Texas Railroad Company (MKT), did not have Board authorization to abandon the Bridge and that UP's purported abandonment consummation is therefore null and void.

On January 29, 2009, Great Rivers Environmental Law Center (Great Rivers) filed a comment in support of the declaratory order request. On March 12, 2009, Rails to Trails Conservancy, Save the Katy Bridge Coalition, and Missouri Parks Association (Commenters) jointly moved that § 106 of the National Historic Preservation Act, 16 U.S.C. § 470 *et seq.* (NHPA), be complied with in connection with the proposed Bridge abandonment, and that the Board direct UP to cease and desist from further bridge demolition, salvage, or removal activities pending compliance with the § 106 process.² UP filed a single reply to Missouri and Great Rivers on March 16, 2009,³ and a reply to Commenters on March 25, 2009. As discussed below, we are issuing this declaratory order finding UP's attempted abandonment consummation

¹ Missouri initially submitted the petition and a request for waiver of the filing fee on January 12, 2009, but the petition was not docketed until February 12, 2009, when the Board granted Missouri's waiver request. Because the Board could not accept the petition for filing until it ruled on Missouri's waiver request, February 12, 2009, is the official filing date.

² Letters in support of Commenters' motions were filed by the Missouri Department of Natural Resources on April 2, 2009, and Boonville on April 17, 2009. UP filed a reply to Boonville's letter on May 1, 2009.

³ Missouri filed a petition for leave to reply and a reply to UP's reply on March 23, 2009. UP filed a reply in opposition to Missouri's petition and a reply to Missouri's reply, on April 1, 2009. In the interest of a more complete record, we will grant Missouri's petition for leave and will accept both its and UP's reply into the record.

premature and not valid. We are granting Commenters' motion to compel compliance with § 106 of NHPA and denying their motion to issue a cease and desist order as unsupported.

BACKGROUND

The Bridge crosses the Missouri River at milepost 191 of a 199.92-mile line that extends between milepost 26.92 at or near Machens, in St. Charles County, and milepost 226.84 at or near Sedalia, in Pettis County, Mo. The Board's predecessor, the Interstate Commerce Commission (ICC), authorized MKT's abandonment of the line in a decision served on March 16, 1987 (MKT Aban.).

In that decision, the ICC noted that MKT was "presently negotiating an agreement with [the Missouri Department of Natural Resources (MDNR)] for interim trail use of the entire right-of-way," pursuant to § 8(d) of the National Trails System Act, 16 U.S.C. § 1247(d), and said that it "will proceed to issue a [Certificate of Interim Trail Use or Abandonment (CITU)] for the entire Line" in the absence of a successful offer of financial assistance for continued rail service.⁴ See MKT Aban., slip op. at 7; 49 C.F.R. § 1152.29(c). The ICC also imposed two conditions on its grant of abandonment authority, one of which (the § 106 historic preservation condition) is pertinent here, see pages 6-7, *infra*.

The ICC issued the CITU on April 27, 1987,⁵ and MKT entered into an interim trail use/rail banking agreement with MDNR on June 25, 1987. Under the terms of the agreement, the 199.92-mile right-of-way was to be conveyed to MDNR pursuant to the Trails Act by quitclaim deed, which was subsequently executed on November 9, 1987.⁶ Both Section 6 of the agreement and the quitclaim deed expressly excluded the bridge from the property to be conveyed to MDNR. However, Section 6 of the agreement: (1) specifies that "the bridge shall be kept available for transportation purposes . . . and that MDNR upon execution of waivers of liability acceptable to MKT may utilize the bridge for trail purposes;" and (2) reserves for MKT "the right to modify the bridge structure as may be required to improve transportation, so long as MDNR's right to utilize the premises for interim trail use is not adversely affected thereby." See

⁴ MDNR had filed a Statement of Willingness to Assume Financial Responsibility for the line (Statement of Willingness), see 49 C.F.R. § 1152.29(a), on September 16, 1986.

⁵ Employing the language of 49 C.F.R. § 1152.29(a), the CITU provided as follows:

If an interim trail use/rail banking agreement is reached, it must require the trail user to assume, for the term of the agreement, full responsibility for management of, any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against, the right-of-way.

⁶ The Board usually does not receive a copy of the interim trail use/rail banking agreement. However, the agreement in this case was submitted to the Board as Exhibit A of Missouri's petition for a declaratory order.

Petition, Exhibit A at 9, Agreement. Section 8 of the agreement provides that for “those portions of the premises for which possession has been delivered to MDNR, MDNR agrees to operate, assume legal liability for the use of, manage, maintain and control the premises . . .” Id. at 10.

Instead of executing waivers of liability acceptable to MKT for use of the bridge, MDNR routed what became the Katy Trail State Park over the Missouri River via a parallel highway bridge, which was constructed with space reserved for the trail. The bridge has remained unused with its lift span locked in the raised position, and it is not currently usable even for bicycle and pedestrian traffic.⁷ Since 1991, the United States Coast Guard “has repeatedly demanded that UP remove the Bridge,” and in July 2002, it threatened to initiate a civil action under 33 U.S.C. § 525(b) if UP did not submit a demolition plan within 30 days and initiate action as soon as the Coast Guard approved the plan. See UP Reply of March 16, 2009, at 5, and Exhibit 3.

In December 2004, MDNR notified UP by letter that MDNR would exercise its right under the agreement to use the bridge for interim trail use purposes, subject to the execution of waivers of liability acceptable to UP, as MKT’s successor. MDNR reaffirmed its 1987 Statement of Willingness, in which it agreed to “assume full responsibility for taxes (if any), management, and legal liability for the structure,” subject to the terms of the agreement and the CITU. See Petition, Exhibit B. MDNR also complained that a span of the bridge had been removed without notice to it, or its approval, allegedly in violation of the terms of the agreement, and it opined that its intent to use the bridge for interim trail use purposes as soon as possible should obviate the Coast Guard’s concern about the unused bridge.

MDNR subsequently informed UP, in a letter dated May 20, 2005, that it was “permanently waiving its right under the [agreement] to utilize the bridge for trail purposes and releasing UP from any obligation under the [agreement] to keep the bridge available for transportation purposes [and terminating] any responsibility or assumption of liability for the bridge.” See Petition, Exhibit C.

UP then filed a notice of consummation with the Board on May 25, 2005, stating that MDNR had agreed to the bridge abandonment consummation and that UP, effective May 25, 2005, was “exercising its right under the CITU to fully abandon [the bridge].” See Petition, Exhibit D, Notice of Consummation at 1. UP said it was prepared to remove the bridge as soon as the Coast Guard and the U. S. Army Corps of Engineers (Corps) issued the necessary permits.⁸ Thereafter, UP developed plans to remove the bridge and reuse some of its spans to double-track UP’s bridge over the Osage River at Osage City, Mo., approximately 65 miles east of Boonville. UP did not assert that with regard to the bridge it had satisfied the § 106 historic preservation condition, imposed by the ICC in its 1987 decision authorizing the abandonment of

⁷ See State ex rel. Nixon v. Childers, Case No. 05AC-CC00673, slip op. at 4 (Cir. Court of Cole County, Mo., Apr. 25, 2006); Petition, Ex. D at 2, Notice of Consummation.

⁸ Asserting that “the notice of consummation is self-executing” UP said it was “not requesting any affirmative action from the Board.” See Petition, Exhibit D, Notice of Consummation at 2.

the line. Rather, UP noted that the Coast Guard and the Corps were “addressing Section 106 Historic Preservation requirements as to the bridge as part of their permitting processes.” See Petition, Exhibit D, Notice of Consummation at 3.

DISCUSSION AND CONCLUSIONS

Preliminary Matter. UP contends that the petition for a declaratory order is untimely. It claims that the notice of consummation was filed with the Board and served on Missouri on May 25, 2005; that it was a comprehensive document containing exhibits, the legal basis for consummation, and UP’s plans for satisfying the § 106 condition; and that any challenges to the notice should have been filed within 20 days of the filing date as required under 49 C.F.R. § 1104.13(a). We disagree. The Board retains jurisdiction over rail property until abandonment authority has been lawfully consummated. See generally Hayfield N. R.R. v. Chi. & N. W. Transp. Co., 467 U.S. 622, 633-34 (1984). Thus, interested parties are not precluded from challenging here whether UP’s abandonment authority for the Bridge has been properly consummated.

Declaratory Order. Under 5 U.S.C. § 554(e) and 49 U.S.C. § 721, the Board may issue a declaratory order to terminate a controversy or remove uncertainty in a matter that relates to the Board’s subject matter jurisdiction. We have broad discretion to determine whether to issue a declaratory order. See Intercity Transp. Co. v. U.S., 737 F.2d 103 (D.C. Cir. 1984); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C.2d 675 (1989). It is appropriate here to issue a declaratory order to provide clarification on the question presented: whether UP’s bridge abandonment consummation is valid.

UP’s purported abandonment consummation did not become effective because, before a rail carrier may consummate the abandonment of a line or portion of a line, it must comply with any historic preservation conditions imposed in the decision authorizing or exempting the proposed abandonment. Here, the ICC recognized that the Line had “historic structures such as bridges and buildings” and in MKT Aban., slip op. at 9, imposed the following condition:

If abandonment is effected under the CITU, MKT must (a) comply with the procedures in section 106 of NHPA and consult with the State Historic Preservation Officer for appropriate documentation of bridges and structures included in the National Register of Historical Places if they are to be demolished or substantially altered; and (b) consult with and obtain necessary permits from the [Corps] and other Federal and State agencies before salvaging bridges and structures.

UP interprets this provision as not requiring compliance with the § 106 procedures of NHPA in advance of abandonment consummation. Citing Abandonment and Discontinuance of Rail Lines and Transportation Under 49 U.S.C. § 10903, 2 S.T.B. 311, 316-317 (1997) (Abandonments), UP argues that the requirement to fulfill all conditions before an abandonment

may be consummated was not adopted until 1997, well after the ICC decisions in this case.⁹ UP's reliance on Abandonments is misplaced. There the Board adopted the requirement that rail carriers file a notice of consummation within 1 year after abandonment authorization or exemption is granted unless outstanding conditions are still operative. See Abandonments, 2 S.T.B. at 315-17; 49 C.F.R. § 1152.29(e)(2). The Board explained that many proceedings "have some type of condition (environmental, public use, trail use, etc.) that creates a legal and regulatory barrier to consummation . . . until the condition lapses or has been fulfilled." If outstanding conditions are still operative at the end of the 1-year period, the Board stated, "an applicant will have 60 days from the date of satisfaction, expiration or removal of the legal or regulatory barrier to file a notice of consummation." Id. The Board's decision did not address whether a rail carrier could file a notice of consummation where a § 106 NHPA condition is still in effect.

In fact, the ICC in 1987 clarified that "our out of service exemption rules contemplate that conditions required by the environmental laws will be imposed prior to the effective date of a notice [of exemption]," see Boston & Me. Corp. and Springfield Terminal Ry. Co.—Aban. and Discon. of Serv., AB 32 (Sub-No. 36), slip op. at 11 (ICC served Nov. 25, 1987). Then, in its December 11, 1987 decision in that same proceeding, slip op. at 2, the ICC established as Commission policy "now and for the future . . . not to let exemption decisions take effect when there are outstanding environmental issues."¹⁰ This policy was reiterated in Exemption of Out-Of-Service Rail Lines, 4 I.C.C.2d 400, 401 (1988).

Thus, notwithstanding the somewhat ambiguous language used in imposing the historic condition here (and in other proceedings at the time), the requirement to fulfill NHPA and other environmental conditions before an abandonment may be consummated has been ICC and Board policy since at least 1987. This policy is necessary for the Board to carry out its obligations under, and be able to take any steps necessary to enforce compliance with, § 106 of NHPA. This longstanding policy was reiterated and clarified in Consummation of Rail Line Abandonments

⁹ The final rules were actually adopted by the Board at 1 S.T.B. 894 in 1996. The decision UP cites denies reconsideration but makes clarifying changes to the final rule and, with respect to the notice of consummation requirement, clarifies that this requirement is not retroactive. UP, nevertheless, filed a notice of consummation with respect to the purported bridge abandonment consummation.

¹⁰ In the November 25, 1987 decision, slip op. at 9, the ICC explained its prior policy as follows:

When the railroad's notice is filed, SEE [now SEA] analyzes the railroad's environmental report and provides environmental documentation (generally an EA) based on that report. . . . If historic preservation, public use, or other environmental conditions are requested by SEE (or an interested party), we decide in a subsequent decision whether to condition the use of the exemption upon compliance with environmental statutes. Generally, any conditions are imposed prior to the time a notice of exemption becomes effective.

that are Subject to Historic Preservation and Other Environmental Conditions, EP 678, slip op. at 3-4 (STB served Apr. 23, 2008). There the Board stated as follows:

[A]bandonment may not be consummated, and potentially historic property may not be disturbed for any part of the line, until either there is a formal final determination by the Board's Section of Environmental Analysis (SEA) (acting on behalf of the Board) that the project would have no adverse effect on historic resources or a Memorandum of Agreement is entered into that sets forth the appropriate mitigation (i.e., documentation) to satisfy section 106 and the historic review condition is removed.

By this policy statement, the Board clarifies that, regardless of whether a section 106 condition applies to the entire line or is more limited, an historic preservation condition is a regulatory barrier to consummation. Therefore, a railroad should not file a notice of consummation seeking to remove the property from the Board's jurisdiction until the historic review process has been completed and the Board has removed the section 106 condition.

Thus, the § 106 process of NHPA had to be completed before UP could consummate the Bridge abandonment. Because the § 106 process was not completed, UP's bridge abandonment consummation is invalid, and Commenters' motion to compel compliance with § 106 of NHPA is granted.

The parties also disagree regarding whether UP first needed to seek modification of the CITU—to remove the bridge from the CITU, and obtain a replacement CITU for only the portions of the right-of way covered by the interim trail use/rail banking agreement—before it could consummate the abandonment of the bridge. The Board's regulations¹¹ do not specifically address this precise question where an interim trail use/rail banking agreement is reached for a lesser portion of the right-of-way proposed to be abandoned. While this question needs to be resolved, a rulemaking proceeding in which the public is invited to comment would provide a better forum than this proceeding in which to do so. We need not resolve this issue here, because we have already found UP's abandonment consummation invalid. Without ruling on whether UP was required to seek modification of the CITU before consummating the bridge abandonment, we will vacate the CITU for the portion of the right-of-way encompassed by the bridge. This decision is limited to the specific facts and circumstances of this case.

The Board is aware that the Corps had begun a § 106 process for the bridge, as that process was being monitored by SEA. In a new development, the Coast Guard in a letter filed on February 8, 2010, states that it has been notified that UP now intends "to transfer ownership of the subject bridge to the City of Boonville [and that the] impending transfer [would suspend] the Section 106 Memorandum of Agreement process that was currently in progress for the [then proposed] removal of the M-K-T Bridge."

¹¹ 49 C.F.R. § 1152.29(c)(2) and (d)(2).

Although the bridge is no longer embraced by the CITU, UP cannot consummate its abandonment until the Board fulfills its obligations under § 106 of NHPA. Because the bridge will be transferred, rather than demolished or substantially altered, SEA will consider whether a “no adverse effect” determination may be issued,¹² terminating the § 106 NHPA process. If SEA issues such a determination and the State Historic Preservation Officer concurs, UP’s interest in, and the Board’s jurisdiction over, the bridge would then be extinguished.

Cease and Desist Order: Commenters assert that UP intends to salvage the bridge and has already engaged in “anticipatory demolition” in violation of § 110(k) of NHPA, which prohibits Federal agencies from issuing loans, grants, permits, licenses, or other forms of assistance to applicants who adversely affect historic properties with the intent of avoiding the requirements of the § 106 process. They ask the Board to issue a cease and desist order to prevent UP from further demolition, removal, or salvage activities until the § 106 process of NHPA has been complied with.

UP responds that it removed a single 62-foot approach span to the 1,500-foot bridge in the early 1990s. It claims that this had no impact on the remainder of the bridge, and in particular, the historically important lift span, and it notes that no one had raised the anticipatory demolition issue until now. UP explains that it removed the approach span for flood mitigation purposes. By removing the span, UP says it was able to increase the vertical clearance, and thereby raise the roadbed, of an active line of the former Missouri Pacific Railroad Co. that runs parallel to the Missouri River.

Citing Section 6 of the agreement, UP contends that the removal of the approach span was consistent with MKT’s (now UP’s) reserved right to modify the bridge structure as may be required to improve transportation. UP insists that “[s]ince the early 1990s, no further removal or demolition activities have occurred, and [that it] will not remove any more of the bridge until completion of the historic review process.” See UP Reply of March 25, 2009 at 12; Petition, Exhibit A, Agreement at 9. Based on these assurances, we find that Commenters have not established that UP acted, or is likely to act, with the requisite intent to avoid the § 106 process of NHPA. Accordingly, we will deny their motion for a cease and desist order.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Missouri’s petition for leave to file a reply to UP’s reply is granted. Both Missouri’s reply and UP’s response are accepted into the record.

¹² “Adverse effect” is the second of 3 possible steps in the § 106 NHPA process (the other 2 are identification and mitigation). A determination that an action will have no adverse effect on a structure found eligible for the National Register of Historical Places ends the § 106 process.

2. Missouri's request for a declaratory order is granted as discussed above.
3. Commenters' motion to compel compliance with § 106 of NHPA is granted.
4. Commenters' motion for a cease and desist order is denied.
5. The CITU is vacated for the portion of the right-of-way encompassed by the bridge.
6. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Nottingham.



Roy P. Farwell
Senior Counsel-Northern Region

June 24, 2011

Megan McGuire
City Planner – City Hall
525 East Spring Street
Boonville, MO 65233

Rence T. Slusher
Deputy Commissioner/General Counsel
PO Box 809
Jefferson City, MO 65102

William J. Bryan
Director – Department of Natural Resources
PO Box 176
Jefferson City, MO 65102

Re: Katy Bridge MOA

Dear Ms. McGuire, Ms. Slusher and Messr. Bryan:

Attached to each of you is a fully executed original of the Katy Bridge MOA for your file(s).

Very truly yours,

A handwritten signature in black ink, appearing to read "Roy P. Farwell".
Roy P. Farwell

Attachment

MEMORANDUM OF AGREEMENT

COMES NOW, the Parties to this Agreement, the Office of Administration and Department of Natural Resources for the State of Missouri (collectively referred to herein as the "State"), Union Pacific Railroad Company ("UP") and the City of Boonville ("Boonville") and for the Agreement reached regarding the disposition of the M-K-T Railroad Bridge over the Missouri River at Boonville, Missouri ("Katy Bridge"), the Parties state as follows:

WHEREAS, UP owns the currently unused Katy Bridge;

WHEREAS, UP proposed using spans from the Katy Bridge to reduce the cost to construct the Osage River Bridge;

WHEREAS, the State and Boonville believe that leaving the Katy Bridge intact and in place has potential historic, cultural, economic and recreational significance to citizens of Missouri;

WHEREAS, the State of Missouri through Missouri Department of Transportation (MoDOT), has applied for and received American Recovery and Reinvestment Act (ARRA) funds from the Federal Railroad Administration (FRA) under the High-Speed Intercity Passenger Rail Program to assist in the construction of a second main line rail bridge over the Osage River at Osage, Missouri (Osage River Bridge), that will improve on-time performance and reliability of passenger train service on UP tracks;

WHEREAS, the ARRA funds may make construction of the Osage River Bridge feasible without the use of spans from the Katy Bridge;

WHEREAS, Boonville has expressed its desire and willingness to take over ownership and responsibility of the Katy Bridge in order to develop its historic, cultural, economic and recreational potential;

WHEREAS, the Parties at this time believe it is in the best interest of all Parties to resolve the issues remaining regarding the Katy Bridge by having UP move forward with MoDOT regarding the ARRA rail project and transfer ownership of the Katy Bridge to Boonville;

NOW THEREFORE, AND FOR THE AGREEMENTS SET OUT BELOW, the Parties agree as follows:

1. It is the reported desire of UP and MoDOT to move forward on the shovel ready Osage River Bridge project in an efficient manner. It is understood that MoDOT and UP will make their best efforts to finalize and execute as expeditiously as feasible a formal agreement for the construction of the Osage River Bridge, including the commitment by MoDOT to contribute 80% of the cost of the bridge, up to a maximum of \$22,600,000, from previously approved ARRA funds.
2. The State will continue to pursue applications for other improvements along the Amtrak route that have been previously identified.

3. The State will work with all Parties to assure the necessary state permits are obtained for the Osage Project and the Katy Bridge as expeditiously as possible, and will cooperate with UP and Boonville on obtaining any other federal or local permits required for the project and the conveyance of the Katy Bridge.
4. The Parties will work together to seek extensions or resolutions of any necessary timelines to effectuate this MOA.
5. The State of Missouri, through the Missouri Attorney General, has dismissed the Surface Transportation Board ("STB") proceeding related to the Katy Bridge: (State of Missouri v. Surface Transportation Board, Case No. 10-1285 (D.C. Cir. filed, Sept. 10, 2010)). UP and Boonville will cooperate with the State, as the Trail Manager, to resolve any litigation or proceeding that impairs this settlement. Upon execution of the agreement between MODOT and UP referenced in Paragraph 1, UP and Boonville will cooperate with the State, as the Trail Manager, in any future filings with the STB necessary to preserve the Katy Bridge for interim trail use/railbanking, including, but not limited to, consenting to a motion to re-open the abandonment proceeding (Docket No. AB 102 (Sub-No. 13)), consenting to the issuance of a railbanking order, as well as any filings necessary to comply with Section 106 requirements, and permit the transfer of the Katy Bridge section to Boonville. Accordingly, all Parties agree to refrain from any filings before any agency or board that would preclude interim trail use/railbanking of the Katy Bridge or permit abandonment of the Bridge, unless otherwise agreed to by the Parties, and the Parties will cooperate to execute any agreement and perform any other steps needed to secure or implement STB approval of interim trail use/rail banking of the Bridge.
6. UP will sell and convey by quitclaim deed the Katy Bridge to Boonville for the legal consideration of ten dollars (\$10.00), upon commencement of physical construction of the Osage River Bridge, not including preliminary planning, design, permitting and similar pre-construction items, on condition that such construction is funded pursuant to the agreement referenced in Section 1, and upon STB approval of interim trail use/rail banking of the Katy Bridge. This sale and conveyance will be made in accordance with and subject to the National Trails Systems Act, 16 U.S.C. 1247(d), and the terms and conditions of the STB decision approving the interim use/rail banking of the Katy Bridge. If rail service is reactivated on the property pursuant to the National Trails System Act, then UPRR shall have the right to repurchase the Katy Bridge in accord with the provisions of that Act and at fair market value of the Bridge. The provisions contained in the previous two sentences shall survive the closing and delivery of the Deed.
7. UP will provide to Boonville all original drawings, plans and any other historical documents regarding the Katy Bridge construction in its possession.
8. Boonville agrees to accept the conveyance of the Katy Bridge "as is" and agrees to waive all claims against UP based on the condition of the Bridge or any lack of maintenance or repair thereto, and hold UP harmless against any future loss, claims or liability arising out

of the transfer of or condition of the Katy Bridge. Boonville also agrees to accept the conveyance of the Katy Bridge subject to all licenses, easements or other agreements existing as of the time of closing. UP will cooperate to assign to Boonville, and Boonville will assume, any rights and obligations that UP has in such agreements, other than the UP owned railroad right-of-way along the southerly bank of the Missouri River and any third party uses thereon. Boonville will execute and deliver to UP a document embodying these conditions as part of the closing of the transfer of the Katy Bridge, in a mutually agreeable form, and either or both conditions may, at UP's election, be included on the face of the quitclaim deed and bill of sale.

9. Boonville shall be responsible for constructing, repairing and maintaining both the missing approach span between the Katy Trail and the north side of the Bridge and the missing Bridge span on the south end of the Bridge. The State will provide nonmonetary assistance to Boonville to reroute the Katy Trail to each end of the Bridge structure and immediate abutments for safe and effective trail use. Boonville will make these repairs a priority improvement to the Bridge; however, Boonville has the right, if it so desires, not to construct, repair and/or maintain the Bridge if it decides to prohibit pedestrian access on the bridge.
10. Boonville shall be responsible for repairing and maintaining the Bridge and ensuring that it is in compliance with the American with Disabilities Act (ADA). Boonville has the right, if it so desires, not to repair and maintain the Bridge and ensure that it is in compliance with the American with Disabilities Act (ADA) if it decides to prohibit pedestrian access on the bridge.
11. Whenever Boonville restricts pedestrian access on the bridge, it shall redirect trail traffic via an alternative route that is conducive to non-motorized travel and provide proper signage. Nevertheless, Boonville agrees to maintain a permanent alternative trail route through the City of Boonville that is conducive to non-motorized travel and provide proper signage for individuals utilizing the trail.
12. UP will provide Boonville with such easement rights as are necessary to operate and maintain the portions of the Katy Bridge that are on or over UP's property including the rights necessary to construct, maintain and operate the missing approach span over and above UP's tracks near the south end of the Bridge, with the understanding that the replacement of missing approach span must clear the top of the rail by no less than 23 feet 6 inches and must be constructed pursuant to plans that are satisfactory to UP. All future plans for reconstruction of or modification to portions of the Katy Bridge on or over UP's right of way shall be subject to approval by UP. UP approval of plans shall be in accord with UP engineering standards and shall not be unreasonably delayed or withheld.
13. Boonville will execute at the closing of the transfer of the Bridge a right of first refusal to UPRR to salvage the Bridge in its entirety, if Boonville (or subsequent owner of the Bridge) should ever determine that the Bridge is no longer needed in its current location.

THE PARTIES HERETO ACKNOWLEDGE THAT THEY HAVE READ AND UNDERSTAND THIS AGREEMENT, AND AGREE TO BE BOUND BY ALL TERMS, CONDITIONS, AND PROVISIONS OF THIS AGREEMENT, AS INDICATED BY THEIR SIGNING OF THIS AGREEMENT.

Tommy K. Love
Union Pacific Railroad Company

6/22/2011
Date

Julie Thacker, Mayor
City of Boonville

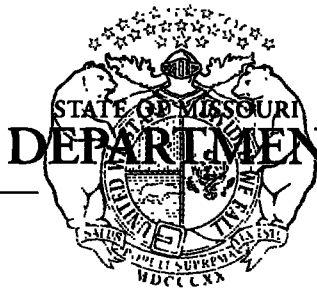
6.6.2011
Date

Kevin G. Simmons
Office of Administration

5-23-2011
Date

Ann J. J.
Department of Natural Resources

5/25/2011
Date



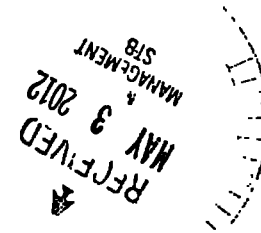
Jeremiah W. (Jay) Nixon, Governor • Sara Parker Pauley, Director

DEPARTMENT OF NATURAL RESOURCES

www.dnr.mo.gov

April 10, 2012

Honorable Julie Thacher
Mayor, City of Boonville
525 East Spring Street
Boonville, Missouri 65233



Re: Katy Bridge Transfer of Ownership (STB) Boonville, Cooper County, Missouri

Dear Mayor Thacher:

Thank you for submitting information about the above referenced project for our review pursuant to Section 106 of the National Historic Preservation Act (P.L. 89-665) and the Advisory Council on Historic Preservation's regulation 36 CFR Part 800, which require identification and evaluation of cultural resources.

We have reviewed the information provided concerning the above referenced project. The Missouri River (Katy) Bridge at Boonville has been determined to be eligible for inclusion in the National Register of Historic Places. We have also determined that the proposed Alternate No. 2, with a trail on the bridge deck to provide for pedestrian and bicycle use, will have **no adverse effect** on the historic fabric of the Katy Bridge as the plans and specifications are in conformance with the Secretary of the Interior's Standards and Guidelines for Rehabilitation.

We look forward to continuing to work with the City of Boonville on this project. Please be advised that, should project plans change, or another alternate for pedestrian usage be proposed, information documenting the revisions should be submitted to this office for further review and comment on possible effects to this historic property. In the event that cultural materials are encountered during project activities, all construction should be halted, and this office notified as soon as possible in order to determine the appropriate course of action.

If you have any questions, please write Judith Deel at State Historic Preservation Office, P.O. Box 176, Jefferson City, Missouri 65102 or call 573/751-7862. Please be sure to include the SHPO Log Number (001-OS-04) on all future correspondence or inquiries relating to this project.

Sincerely,

STATE HISTORIC PRESERVATION OFFICE

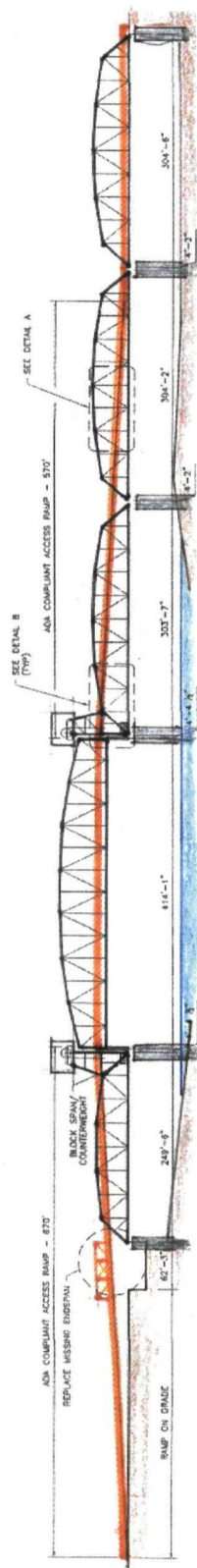
A handwritten signature in black ink, appearing to read "Mark A. Miles".

Mark A. Miles
Director and Deputy
State Historic Preservation Officer

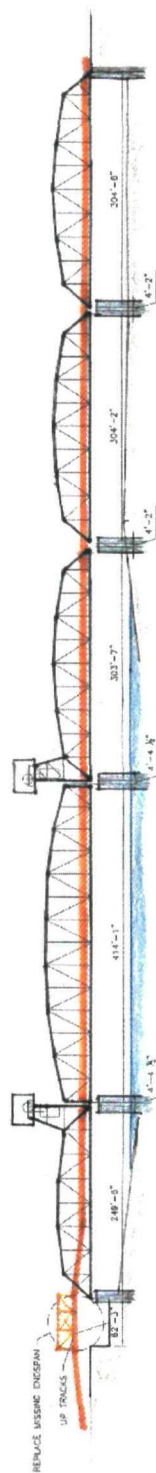
MAM:jd

c Victoria Rutson, STB
Megan McGuire, City of Boonville

Comparison of Alternates #1 and #2



ALTERNATE # 1 - LIFT SPAN FIXED IN RAISED POSITION



ALTERNATE # 2 - LIFT SPAN OPERATIONAL

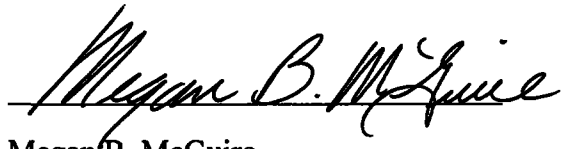
**Statement of Willingness
To Assume Financial Responsibility**

In order to establish interim trail use and railbanking under 16 U.S.C. section 1247(d) and 49 CFR section 1152.29, the City of Boonville, Missouri (the “City”), is willing to assume full responsibility for management of, for any legal liability arising out of the transfer or use of and for the payment of any and all taxes that may be levied or assessed against the right-of-way and structure owned and operated by Union Pacific Railroad Company. The right-of-way known as the MKT River Bridge (the “MKT Bridge”) and the related railroad property all being part of a former Missouri-Kansas-Texas Railroad Company Line, now owned by Union Pacific Railroad Company as successor in interest, extends from milepost 191.47 at Boonville to milepost 191.16 North of Boonville, a distance of approximately .3 miles in Cooper and Howard Counties, Missouri. The right-of-way is part of a line of railroad proposed for abandonment in Docket No. STB AB-102(Sub-No. 13).

A map of the MKT Bridge and related railroad property generally depicting the right-of-way is attached as **Appendix 5**.

City acknowledges that use of the right-of-way is subject to the Petitioners continuing obligation to meet its responsibilities identified above and subject to possible future reconstruction and reactivation of the right-of-way for rail service.

A copy of this statement is being served on Union Pacific Railroad Company on the same date it is being served on the Board.

A handwritten signature in black ink, reading "Megan B. McGuire". The signature is written in a cursive style with a horizontal line drawn through the middle of the text.

Megan B. McGuire

Attorney For Petitioner

